No. 95-2024

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

C. MARTIN LAWYER, III
Appellant,

V.

THE UNITED STATES DEPARTMENT
OF JUSTICE, ET. AL.
Appellees.

On Appeal From the United States District Court
for the Middle District of Florida

Brief for Amicus Curiae, Americans for the Defense of Constitutional Rights, Inc., In Support of Appellant

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Interest of Amicus Curiae

Americans for the Defense of Constitutional Rights, Inc., (ADCR) is a non-profit corporation organized under the laws of North Carolina by the five original plaintiffs in *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816 (1993). Because of their faith in the values of the Equal Protection Clause and their concern that racial gerrymanders and racial quotas are endangering those values and exacerbating, rather than reducing, racial divisions, these five citizens created ADCR. Among ADCR's missions are to inform the public about some of the odious practices which currently threaten the goal of a "color blind society;" urge legislators and public officials to enact laws and issue decrees that will meet these threats; and, as a last resort, to encourage or even institute litigation to eliminate procedures, methodology, and social structures which tend to polarize our citizens along racial lines.

ADCR has requested consent of all parties to file this brief. At the time of printing, ADCR has received consent to file from some, but not all, of the parties.

Summary of Argument

Appellant has standing to challenge Florida State Senatorial District 21, in which he is a registered voter, and he is not barred by the results of a mediated reapportionment plan to which he gave no consent. That plan, purportedly intended to remedy a violation of the Equal Protection Clause, was itself unconstitutional because of the manner in which it was

developed and implemented. Instead of following the procedure proscribed by the Florida Constitution - whereunder the State Legislature, Attorney General and the Florida Supreme Court would play a role - the District Court improperly used an ad hoc mediated procedure to devise redistricting Settlement Plan 386. The District Court's circumvention of the Florida procedure not only contravened principles of federalism but also resulted inevitably in a redistricting plan that violated the Equal Protection Clause of the Fourteenth Amendment.

Equal Protection requires that, if racial classifications have been used improperly in the electoral process or otherwise, the remedial action must connect closely with the harm to be remedied. This "narrow tailoring" can best be achieved by state legislatures and state courts, which are familiar with local conditions - rather than by a federal court, which is less likely to be aware of the available alternatives and their relative desirability. Therefore, when a district court usurps state authority, the constitutionally required exactness of connection between the harm and remedy has not been established; and therefore, the "narrow tailoring" necessary to survive "strict scrutiny" is lacking.

ARGUMENT

I. THE FINAL ORDER ENTERED BY THE DISTRICT COURT UNCONSTITUTIONALLY EXCEEDED THE COURT'S AUTHORITY.

This Court has recently pointed out:

> Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place. Time and again we have emphasized that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than a federal court."

Voinovich v. Quilter, 507 U.S. 146, 156, 113 S.Ct. 1149, 1156-57 (1993), (citing *Growe v. Emison*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)); See also *Reynolds v. Sims*, 377 U.S. 533, 586 (1964).

These precedents announce a basic principle of federalism, which was violated in two respects by the Final Order entered by the District Court. (Jur. St. at 3a-18a). First, as perceived by Chief Judge Tjoflat's special concurrence, (Jur. St. at 19a-20a), the Final Order could not properly be enacted without a judicial finding that the plan being superseded had violated "federal law" - namely, the Equal Protection Clause. As stated in *Voinovich*, "[f]ederal courts are barred from

intervening in state apportionment in the absence of a violation of federal law." 507 U. S. at 156. Thus, without any judicial finding of a violation of federal law, the District Court had no authority to reapportion Florida senatorial districts.

As a registered voter in Florida Senatorial District 21, Appellant had the standing necessary to challenge the unsupported judgment of the District Court. *Shaw v. Hunt*, 116 S.Ct. 1894, 1900 (1996). Indeed, Appellant Lawyer was the only plaintiff who resided in Senate District 21 and therefore was the only plaintiff who had standing to offer such a challenge. (Jur. St. at 2-3) (Since the other plaintiffs had no standing to challenge the redistricting plan, their assent to the Final Order has no significance).

The Final Order resulted from a process of mediation - which is designed to induce an agreed settlement of a dispute; but Appellant Lawyer did not consent either to the procedure used or, even more important, to the Final Order. Therefore, he retained - and never waived - his right to object to the omission of the constitutionally necessary jurisdictional finding from the Final Order. Cf. *Martin v. Willis*, 490 U.S. 755, 109 S.Ct. 2180 (1989); *Firefighters v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063 (1986).

Secondly, even if the District Court had made the necessary finding of "a violation of federal law," the Final Order it entered would have violated the requirements of federalism. In its Constitution, Florida has prescribed the exclusive procedure for accomplishing reapportionment. See Florida Constitution, art. 3, § 16 (1968). Thereunder the State

Legislature has the initial responsibility for reapportionment. If the Legislature fails to perform its duty, the Governor must call a "special apportionment session." Should the Legislature still fail in its task, the Florida Attorney General must petition the State Supreme Court to make an apportionment; and that court then has sixty days to do so.

Reapportionment is "primarily the duty and responsibility of the state through its legislature or other body, rather than of a federal court." *Voinovich*, 507 U. S. at 156. As this Court has made clear, the reference to "other body" includes the state courts. *Chapman v. Meier*, 420 U.S. 1 (1975). Thus, in *Scott v. Germano*, 381 U.S. 407, 85 S.Ct. 1525 (1965), this Court remanded a redistricting case to the district court:

> with directions that the District Court enter an order finding a reasonable time within which the appropriate agencies of the state of Illinois, including its Supreme Court, may validly redistrict the Illinois State Senate; provided that the same be accomplished within ample time to permit such plan to be utilized in the 1966 election of the members of the State Senate, in accordance with the provisions of the Illinois election laws.

Id. at 409. Similarly in *Growe v. Emison*, 113 S.Ct. 1075 (1993), this Court vacated an injunction entered by the district court, because "[i]t seems to be have been based upon the mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts." *Id.* at 1081. This Court relied on the

Pullman Doctrine of deferral, whereunder a federal court should defer action "when a constitutional issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case." *Id.* at 1080; see also *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

The District Court did not require State officials to employ the apportionment method prescribed by the State Constitution; nor did it defer its own action to await the possible initiation of reapportionment by State officials acting pursuant to the Florida Constitution. Instead, the District Court devised a new procedure, which utilized mediation. Mediation is designed to induce agreement among the parties and thereby to avoid the cost, delay and trauma involved in litigation. Certainly these are laudable objectives, but they can be attained only by consent of all the parties. When, as here, a party refuses to participate in mediation or to accept a mediated settlement, a court has no basis for entering a final judgment or order. Indeed, to enter an order contravenes the precept that "it is the domain of the states, and not the federal courts, to conduct apportionment in the first place." See *Voinovich,* 507 U. S. at 156.

Admittedly, the Florida Supreme Court had produced the redistricting plan that was being attacked by the lawsuit. However, there is no precedent for the proposition that a past error in drawing a redistricting plan should deprive a state legislature or supreme court of the opportunity to correct the error and draw a new apportionment plan - which could take into account *Shaw v. Reno*, and this Court's subsequent redistricting decisions. The District Court gave neither the Florida

Legislature nor its Supreme Court an opportunity to redraw the State's apportionment plan to remedy any racial gerrymanders which the District Court might have identified and as to which appropriate findings might have been made for the guidance of state authorities in performing their task. In short, the District Court usurped the role of the Florida Legislature and Florida Supreme Court in violation of this Court's pronouncements of federalism.

II. THE DISTRICT COURT'S USURPATION OF STATE AUTHORITY TO REAPPORTION PRECLUDED THE "NARROW TAILORING" REQUIRED BY THE TEST OF "STRICT SCRUTINY."

In *Shaw v. Reno*, this Court held that a racially gerrymandered congressional redistricting plan required "strict scrutiny." 113 S.Ct. at 2825. This scrutiny entailed showing that the plan fulfilled a "compelling governmental interest" and that the plan was "narrowly tailored." *Id.* Although *Shaw v. Reno* concerned congressional districts, the logic of the Court's opinion and of the precedents which underlie that opinion applies equally to state legislative districts. Indeed, the only difference might be that "bizarreness" in drawing a congressional district can sometimes be explained as the result of attempting to comply with the precise equal population requirements of *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526 (1964), but that a similar explanation of "bizarreness" in state legislative districts is less persuasive because the requirement of equipopulousness is applied less rigidly to state legislative apportionments.

In *Shaw v. Reno*, this Court remanded the case for trial. At trial, the state successfully contended that the redistricting plan under attack served a compelling governmental interest in remedying a potential violation of Section 2 of the Voting Rights Act, 42 U.S.C. Section 1973. However, because of the lack of relation between the purported harm and the alleged remedy for that harm, this Court found the State's "position singularly unpersuasive." *Shaw v. Hunt*, 116 S.Ct. 1894, 1906 (1996). In short, because of the failure to connect remedy with harm, "narrow tailoring" was absent and the test of "strict scrutiny" was not met. Cf. *Vera v. Bush*, 116 S.Ct. 1941 (1996); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706 (1989); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 273-74, 106 S.Ct. 1842, 1846-47 (1986).

In remedying racial gerrymanders, the "narrow tailoring" required by *Shaw v. Reno* can best be provided by those who have the greatest familiarity with the local situation - namely, state legislators and judges. Part of the rationale of federalism is to have local problems solved locally insofar as possible and to use federal intervention as a last resort. In the words of this Court:

> We have repeatedly emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination," for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name.

Connor v. Finch, 431 U.S. 407, 413, 97 S.Ct. 1828, 1833-34 (1977).

The failure of the District Court to entrust reapportionment to Florida legislators and judges not only was contrary to principles of federalism but also contravened the requirement of "strict scrutiny," because reapportionment was removed from the hands of those best qualified to accomplish the necessary "narrow tailoring." The undoubted good motives of the judges in the District Court and the merits of mediation as a means for solving disputes are immaterial. Even the participation by representatives of the Florida House and Senate in the mediation process does not salvage the situation. The fact remains that the court below bypassed the apportionment procedure set out in the Florida Constitution and thereby imposed a federal solution - instead of seeking a local solution, as was constitutionally mandated.

In the context of federalism, it must be presumed that state officials acting pursuant to state procedures can best - and with the least disruption - provide a remedy for an unconstitutional racial gerrymander. Until that presumption has been rebutted by evidence of intransigence or inability to perform their duty on the part of state legislators or judges, no reapportionment decree should be entered by a federal court. Cf. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978).

Only in this way can the remedy for a racial gerrymander be best designed to cure the harm caused by the gerrymander. Only in this way is the "narrow tailoring" provided that *Shaw v. Reno* requires.

In the *Shaw* litigation, after this Court rendered its decision on June 13, 1996, which held unconstitutional the North Carolina redistricting plan, the district court, by divided vote, allowed the North Carolina Legislature until April 1, 1997 to draw a new plan. The district court's rationale for delaying a remedy until the November 5, 1996 election was that to impose a judicial remedy shortly before that election would cause unwarranted disruption. The district court's deference is in startling contrast to the decision of the District Court in the case at hand. Unlike the North Carolina Constitution, the Florida Constitution provides a specific procedure whereby the state supreme court can prepare a reapportionment plan if the legislature fails to do so. Thus, legislative inaction does not preclude a state-authorized remedy. Moreover, there has been no showing that disruption of the Florida electoral process would result if the district court had utilized the process provided by the Florida Constitution. Under these circumstances, the intervention of the federal district court - which not only violated principles of federalism but also prevented a "narrowly tailored" remedy - should not be condoned.

CONCLUSION

The Final Order of the court below violated well established principles of federalism; and, by doing so, it also impeded the designing of a constitutionally

permissible remedy for any harm caused by Florida's racially gerrymandered senatorial districts. Therefore, the final order should be vacated.

Respectfully Submitted,

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